

JUL 18 1995

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BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES, STATE OF UTAH

IN THE MATTER OF THE REQUEST)	CO-OP'S OPPOSITION TO
FOR AGENCY ACTION BY PETITIONERS)	REQUEST FOR REHEARING AND
NORTH EMERY WATER USERS)	MODIFICATION OF ORDER
ASSOCIATION, HUNTINGTON-CLEVELAND)	
IRRIGATION COMPANY, and CASTLE)	Docket No. 94-027
VALLEY SPECIAL SERVICES DISTRICT)	Cause No. ACT/015/025-93B

C.W. Mining Company d/b/a Co-op Mining Company (Co-op) respectfully submits this Memorandum in opposition to Castle Valley Special Service District's Request for Re-hearing and Modification of Order Dated June 13, 1995 by the Utah Board of Oil, Gas and Mining.

ARGUMENT

I. THE BOARD'S FINDINGS AND CONCLUSIONS ARE WITHIN ITS SCOPE OF REVIEW.

In its June 13, 1995 Order the Board denied Petitioners' appeal, and upheld DOGM's revision of Co-op's permit to allow mining of the Tank seam. The Board made findings of fact and conclusions of law it deemed necessary to support its Order. The Board is required by law to make detailed findings and conclusions for purposes of appeal. As stated in Adams v. Board of Review of Indus. Comm'n, 821 P.2d 1, 4-5 (Utah App. 1991):

An administrative agency must make findings of fact and conclusions of law that are adequate detailed so as to permit meaningful appellate review.

In order for us to meaningfully review the findings of the commission, the findings must be "sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached." [T]he failure of an agency to make adequate findings of fact in material issues renders

its findings "arbitrary and capricious" unless the evidence is "clear, controverted and capable of only one conclusion." [Citations omitted]

The Utah Supreme Court has clearly described the detail required in administrative findings in order for findings to be deemed adequate.

[An administrative agency] cannot discharge its statutory responsibilities without making findings of fact on all necessary ultimate issues under the governing statutory standards. It is also essential that [an administrative agency] make subsidiary findings in sufficient detail that the critical subordinate factual issues are highlighted and resolved in such a fashion as to demonstrate that there is a logical and legal basis for the ultimate conclusions. The importance of complete, accurate, and consistent findings of fact is essential to a proper determination by an administrative agency. To that end, findings should be sufficiently detailed to disclose the steps by which the ultimate factual conclusions, or conclusions of mixed fact and law, are reached. *Without such findings, this Court cannot perform its duty of reviewing [an administrative agency's] order in accordance with established legal principles and of protecting the parties and the public from arbitrary and capricious administrative action.* [Italics in original] [quoting Milne Truck Lines, Inc. v. Public Serv. Comm'n, 720 P.2d 1373, 1378 (Utah 1986)]

While a failure to make detailed findings is reversible error, Co-op knows of no case where an agency was reversed for making its findings too detailed. The findings to which Castle Valley objects are "subsidiary findings in sufficient detail that the critical subordinate factual issues are highlighted and resolved in such a fashion as to demonstrate that there is a logical and legal basis for the ultimate conclusions." They are *required*, as "subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached." *Id.* The Board should not risk reversal, as occurred in Hidden Valley Coal Co. v. Utah Bd. of Oil, Gas & Min., 866 P.2d 564, 568-69 (Utah App. 1993), by omitting findings and conclusions.

Castle Valley would not now be questioning the Order if the findings and conclusions had been favorable to Castle Valley. Castle Valley admits, "The information submitted by Petitioners concerning the regional aquifer and the movement of water through the stratigraphy in the area of the Co-op Mining operations was [relevant] to place the proposed Tank Seam in a context with those operations and to avoid the segmented view of the operations Petitioners believed Co-op and the DOGM had taken in prior proceedings." [Request for Rehearing p.2] The facts and

conclusions to which Castle Valley objects do just what Castle Valley intended -- they are necessary subsidiary findings (tried with Castle Valley's consent, and amply supported by the evidence), whose purpose is to place the Tank seam operation in context with Co-op's other operations, and to avoid an improperly segmented view of those operations. That the findings and conclusions are against Castle Valley does not justify deleting them.

Castle Valley's reliance on Blaine Hudson Printing v. Utah State Tax Comm'n, 870 P.2d 291 (Utah App. 1994) and Parkdale Care Center v. Frandsen, 837 P.2d 989 (Utah App. 1992) is misplaced. Blaine addressed the legislature's choice to withhold from the Tax Commission jurisdiction over appeals of county property tax decisions. Parkdale recognized the Industrial Commission lacks subject matter jurisdiction over tort and breach of contract claims. Neither case dealt with the scope of an agency's power to make findings and conclusions with respect to a claim properly before the agency. Since the parties "were not attempting to adjudicate or re-adjudicate the permit for the currently mined area" [Request for Rehearing p.4], the Board correctly did not enter an Order adjudicating the permit for the currently mined area. However, the Board certainly may, as it has here, make findings and conclusions it deems reasonably necessary to support its ultimate decision on Co-op's right to mine the Tank seam.

II. CASTLE VALLEY WAIVED ANY RIGHT TO CONTEST THE BOARD'S FINDINGS AND CONCLUSIONS.

A waiver is the intentional relinquishment of a known right:

[T]here is only one legal standard required to establish waiver under Utah law. We conclude that Phoenix properly stated the requirements for waiver:

A waiver is the intentional relinquishment of a known right. To constitute waiver, there must be an existing right, benefit or advantage, a knowledge of its existence, and an intention to relinquish it.

We further clarify that the intent to relinquish a right must be distinct. Under this legal standard, a fact finder need only determine whether the totality of the circumstances "warrants the inference of relinquishment." [Citations omitted]

Soter's, Inc. v. Deseret Federal Sav. & Loan Ass'n, 857 P.2d 935, 942 (Utah 1993)

The impact of Co-op's past and present mining activities on Big Bear and Birch Springs was tried not only with Castle Valley's consent, but in response to Castle Valley's repeated

insistence that the Board consider evidence on the issue. If Castle Valley had truly considered the issue irrelevant, it would not have pressed so vehemently for admission of evidence on the issue. Even now Castle Valley admits those facts are relevant "to produce a context within which to review the mining of a certain stratigraphic layer known as the Tank Seam." [Request for Rehearing p.4]. The totality of the circumstances warrants the conclusion that Castle Valley intentionally relinquished any right to challenge the Board's findings and conclusions on that issue.

III. CASTLE VALLEY IS ESTOPPED TO CONTEST THE BOARD'S FINDINGS AND CONCLUSIONS.

Estoppel requires "(1) an admission, statement, or act inconsistent with the claim afterwards asserted, (2) action by the other party on the faith of such admission, statement, or act, and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act." United Park City Mines Co. v. Greater Park City Co., 870 P.2d 880, 891(Utah 1993).

Castle Valley's statements during the hearing in this matter are inconsistent with its argument that findings on the impact of Co-op's mining activities on Big Bear and Birch Springs are beyond the Board's authority. In response to Castle Valley's position Co-op was forced to prepare and present its own evidence on the issue. If Castle Valley could now repudiate its prior position, the injury to Co-op from having to return and relitigate the same issue is obvious. Castle Valley is estopped from the relief it now seeks.

IV. THE RELIEF CASTLE VALLEY SEEKS IS NOT ALLOWED IN THE RULES.


Castle Valley's request is procedurally defective. Public participation in the permitting process is governed by the rules of the Division of Oil, Gas & Mining. R645-300-100 contains the procedures for public participation at the Division level. R645-300-200 contains the procedures for Board review of decisions by the Division. Once the Board issues its written findings of fact, conclusions of law and order under R645-300-212.400, as it has done here, there

is no provision for further administrative review. If Castle Valley believes itself aggrieved by the Board's Order, its next procedural step is an appeal, not a rehearing.

CONCLUSION

For the reasons stated above, Castle Valley Special Service District's Request for Re-hearing and Modification of Order is without merit and should be denied.

DATED this 17 day of July, 1995.


Attorney for Respondent
C.W. Mining Company d/b/a
Co-op Mining Company

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the above document on all parties of record in this proceeding by mailing a copy thereof, properly addressed, with postage prepaid, to:

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Attorneys for
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Dated at Salt Lake City, Utah this 17 day of July, 1995.



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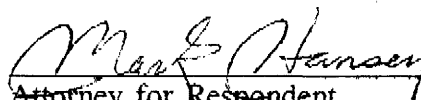
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Dated at Salt Lake City, Utah this 17 day of July, 1995.

